

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
WINSOME MARTIN, :
: 11-CV-1089 (NGG) (RLM)
Plaintiff, :
: July 6, 2012
:
v. : Brooklyn, New York
:
LUTHERAN AUGUSTANA CENTER, :
et al., :
Defendant. :
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TRANSCRIPT OF CIVIL CAUSE FOR SETTLEMENT CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: AMBROSE WOTORSON, ESQ.

For the Defendant: DAVID GREENHAUS, ESQ.
RICHARD DORN, ESQ.

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1 THE CLERK: Civil cause for settlement
2 conference, docket number 11-CV-1089, Martin v.
3 Lutheran Augustana Center, et al.

4 Counsel, please state your appearances for
5 the record.

6 MR. WOTORSON: Good morning, your Honor.
7 Ambrose Wotorson for the plaintiff, who is on her way.

8 THE COURT: Well, she's twenty minutes late
9 already.

10 MR. DORN: Richard Dorn, Levy Ratner, for
11 defendant 1199 SEIU.

12 MR. GREENHAUS: David Greenhaus, Jackson
13 Lewis, for Lutheran Augustana Center.

14 MS. ALFREDO: I'm Laura Alfredo (ui)
15 Lutheran Augustana.

16 THE COURT: All right. And, Mr. Dorn, your
17 client is?

18 MS. GUTHRIE: Francine Guthrie, organizer
19 for 1199 SEIU.

20 THE COURT: I'm sorry, I didn't get your
21 last name.

22 MS. GUTHRIE: Guthrie.

23 MR. DORN: G-u-t-h-r-i-e.

24 THE COURT: All right, welcome to all of
25 you. Please be seated. This is on for a settlement

1 conference at the request of the district court, Judge
2 Garaufis. Let me explain the procedures that I
3 typically follow in conducting settlement conferences,
4 and then I'll hear from you if you have any questions,
5 comments, objections or proposals for modifying those
6 procedures.

7 What I would like to do today is have a very
8 detailed discussion with all of you about the case and
9 the facts underlying this case. Now that discovery is
10 completed, presumably, we'll be able to have meaningful
11 discussions, which we couldn't have before because very
12 little discovery had taken place.

13 What I will do is give each attorney an
14 opportunity or a series of opportunities to present
15 what you expect to be able to prove at trial and how
16 you're going to prove it. I don't want to hear
17 conclusory assertions. I know generally what the case
18 is about from -- both from the record and from prior
19 proceedings in the case. But now that discovery has
20 ended, I want to hear specifics. And where there are
21 factual disputes, I want you to acknowledge those
22 disputes and tell me why the version that you're
23 advocating is the more credible or reasonable one.

24 I'd ask you not to interrupt opposing
25 counsel. I anticipate that you will be hearing things

1 that you disagree with but I ask you to please be
2 patient, and I will give you an opportunity to respond.
3 I don't want to have a free-for-all.

4 After I've heard from all counsel in this
5 joint setting, what I would then like to do is meet
6 with each group of parties privately and off the
7 record, with my promise to you that what you tell me in
8 the context of a private conference will remain
9 confidential, unless I have your express authorization
10 to disclose any particular aspect of our discussion.

11 Following the private conferences, we'll
12 reassemble as a group. At that time, I'll tell you
13 what I believe is a fair and reasonable resolution of
14 the case. Now, because we have two groups of
15 defendants in the case, I don't know at the outset
16 whether I'm going to recommend a global settlement that
17 would require that all three groups of parties accept
18 or whether, instead, I would recommend two bilateral
19 settlements with each of the two groups of defendants.
20 I want to get a better feel from the case, from hearing
21 from all of you, before I make that determination.

22 What I will then do after I make my
23 recommendation is -- what I would like to do is have
24 each attorney and client then meet with me privately
25 and respond in confidence as to whether that party

1 accepts or rejects. After I've heard from all three
2 parties, I will then bring everyone back together and I
3 will tell you that we either have a settlement or we
4 don't have a settlement.

5 If there's no settlement, that's all that
6 I'm going to report. I'm not going to provide the
7 breakdown. So for example, if it's a global settlement
8 and I say there's no settlement, no party will know
9 whether it's because one, two or all three parties have
10 rejected. Similarly, if I recommend two separate
11 settlements, one with each of the defendants, as to any
12 bilateral settlement proposal, if one party rejects,
13 that party will not know whether the other side has
14 accepted or rejected.

15 So those are the procedures that I would
16 propose following. Do any of you have any questions
17 about them or any objections to them? All right.

18 Mr. Wotorson, why don't I start with you?

19 MR. WOTORSON: Yes, your Honor. Before I
20 start, I'd like to -- the Court mentioned that it was
21 familiar with the record, and I wasn't sure if that
22 also included perhaps a review of the transcript of our
23 last appearance before Judge Garaufis, because there
24 was an important procedural matter that I raised with
25 the Court, which I think is an important backdrop for

1 our discussions today.

2 And that is, your Honor, we had raised with
3 Judge Garaufis --

4 THE COURT: I don't think there is -- there
5 hasn't been a transcript prepared of that conference.

6 MR. WOTORSON: Okay.

7 THE COURT: So all I know is what's in the
8 docket entry.

9 MR. WOTORSON: In that case, your Honor,
10 I'll be very brief as to the procedural issue. There
11 is a procedural issue that we raised with Judge
12 Garaufis about amending the complaint and possibly
13 having to file a motion to amend the complaint. Judge
14 Garaufis obviously did not grant or deny that, but we
15 did have an extended discussion initially as to whether
16 or not we could do this by stipulation.

17 There was some back and forth and it was
18 during the course of that back and forth that Judge
19 Garaufis at some point simply said, maybe you ought to
20 be talking about settlement, and I thought that was a
21 good idea.

22 Briefly, the amended complaint or the motion
23 to file an amended complaint will seek to add a new
24 cause of action for wrongful termination. The
25 complaint as it stands now does not have a termination

1 component. Ms. Winsome Martin was terminated after
2 this lawsuit was filed, and the complaint will --

3 THE COURT: When was she terminated?

4 MR. WOTORSON: What was your termination
5 date?

6 She was terminated on August 27 of 2011.

7 That was -- excuse me. That termination was after our
8 March 2nd, 2011 filing. The complaint is going to claim
9 under Section 296 of the New York State Human Rights
10 Law that that was retaliatory, and that's what I wanted
11 to bring to the Court's attention.

12 One of the things we will be arguing here
13 today also are the damages that flow from that. We
14 also told Judge Garaufis, if he were to deny the motion
15 to amend, it is a separate set of facts that we can
16 bring a new lawsuit, but I'm not so sure judicial
17 timing would be served by doing that. That when the
18 conversation broke down and we discussed settlement.

19 THE COURT: Well, if she was terminated
20 almost a year ago and only a little over five months
21 after she filed the lawsuit, why was there no previous
22 attempt to amend the complaint?

23 MR. WOTORSON: I think for a variety of
24 reasons. A) We were in litigation, and B), we thought
25 this was merely a continuation. In fact, this issue

1 came up when Mr. Dorn, I believe -- I think I mentioned
2 termination and Mr. Dorn very quickly argued, well, no,
3 this complaint doesn't sound in termination, though I
4 had raised the issue of termination even earlier than
5 that, I think privately with Mr. Dorn, I believe. I
6 don't remember but I think I may have.

7 But at the time of the complaint, we view
8 the complaint as sounding in ongoing mistreatment,
9 because she was employed at the time, and we thought
10 that would just be a continuation of. So the need to
11 actually amend the complaint certainly became more
12 pressing when we received the pre-motion letters from
13 both counsel.

14 THE COURT: Well, if you're going to be
15 charging it as retaliation, then how can it just be a
16 continuation, since you're saying that the object that
17 it's retaliating against is the fact that you filed the
18 lawsuit, so that's hardly a continuation of what came
19 before.

20 MR. WOTORSON: Yes, your Honor. What I'm
21 saying is, my view of -- when we had the complaint, she
22 was still employed and there was ongoing mistreatment
23 as she was working there, including being forced to
24 treat with a mental healthcare professional.

25 It is not uncommon for there to be

1 complaints where there's a retaliation claim and it
2 merely relates back to what has been previously been
3 filed. That's how I viewed it at the time. But as I
4 said, at the appropriate time, if we have to file a
5 motion to amend, we will do so, and if we can't, there
6 will unfortunately have to be a separate lawsuit filed.
7 The statute of limitations under 296 is three years.

8 THE COURT: Has she filed an EEO complaint?

9 MR. WOTORSON: No. No, we have not filed an
10 EEO complaint. I haven't explored it entirely but
11 there's also a possibility that a retaliation claim
12 would also sound under The Rehabilitation Act, to make
13 sure we continue to have federal jurisdiction. But
14 right now, my thought has primarily been centered under
15 296, which also has a three-year statute of
16 limitations. The Rehabilitation Act I believe has a
17 two-year statute of limitations.

18 THE COURT: All right. I take it that's Ms.
19 Martin with you now?

20 MR. WOTORSON: It is.

21 THE COURT: Welcome.

22 All right, Mr. Wotorson, let me hear from
23 you. What do you expect to be able to prove at trial
24 and how are you going to prove it?

25 MR. WOTORSON: The complaint also talks

1 about Ms. Martin being mistreated by Angela Peza (ph)
2 because Angela Peza was a previous supervisor. We're
3 not going to be pursuing that claim. Candidly, the
4 discovery that came up, I think it would be very, very
5 difficult to establish that.

6 But what we will be able to establish,
7 though, is there were a series of letters, series of
8 meetings, in which Ms. Martin was variously complaining
9 about harassment that she was receiving from Ms. Martin
10 (sic), and she would make the complaints --

11 THE COURT: I'm sorry, who was writing
12 letters about --

13 MR. WOTORSON: Ms. Martin, I'm sorry.

14 THE COURT: You just said Ms. Martin was
15 complaining about being harassed by Ms. Martin.

16 MR. WOTORSON: I'm sorry, I apologize, Ms.
17 Peza, Angela Peza, who was her supervisor. There are a
18 few letters and, importantly, there are several
19 meetings that she had, both with the employer as well
20 as the union, complaining about her --

21 THE COURT: I thought I just heard you say
22 you won't be pursuing the claims that she was
23 mistreated by Ms. Peza.

24 MR. WOTORSON: Yes. Your Honor, we will be
25 pursuing claims that as a result of complaining, there

1 was some retaliation, which I told you about before.
2 But more importantly, there's a lawsuit against the
3 union as well for failure to file any grievances,
4 appropriate grievances on her behalf, for basically the
5 failure of fair representation.

6 So she would complain to the union and, in
7 many instances, the union would tell her, amongst other
8 things, that they just don't believe her, that they're
9 not going to file any grievances and there wasn't going
10 to be anything.

11 THE COURT: I thought there were grievances
12 filed.

13 MR. WOTORSON: There were not grievances
14 that were filed for some of the -- the last set of
15 suspension, and certainly towards the end --

16 THE COURT: I thought there was a grievance
17 filed and previously, you argued that they refused to
18 arbitrate for her, but not that they refused to file
19 the grievance.

20 MR. WOTORSON: Your Honor may be correct,
21 I'm getting the terminology wrong. What I'm talking
22 about is the final step in her complaint. But because
23 -- our theory is, because there was no effort to
24 arbitrate it, Ms. Martin was sort of left extremely
25 vulnerable.

1 And the very, very last grievance that she
2 attempted to file resulted in the employer basically
3 saying, as a condition to your continued employment,
4 you have to treat with a mental healthcare
5 professional. We are unaware of anyone else having to
6 do that. There's an extensive union contract that
7 gives even private employees certain due process
8 rights.

9 THE COURT: As I understand it, it was anger
10 management treatment.

11 MR. WOTORSON: It was a little bit more than
12 anger management, which Ms. Martin will tell you about.
13 She actually had to meet with a mental healthcare
14 professional. It wasn't a simple anger management
15 course.

16 THE COURT: Well, presumably, if you're
17 going to get anger management treatment, it's going to
18 be by a professional.

19 MR. WOTORSON: I don't know about that, your
20 Honor. She was -- she actually met with a mental
21 healthcare professional. You can --

22 THE COURT: A psychologist?

23 MR. WOTORSON: It was a psychologist. And
24 in fact, when Ms. Martin went to attend or to visit the
25 psychologist, it was not a -- just a second, your

1 Honor. It was not an anger management course. It had
2 absolutely nothing to do with anger management. Ms.
3 Martin will relate to you privately. After that, we
4 also wrote a letter protesting that, as a result of
5 this, she was forced to treat with a mental healthcare
6 professional.

7 The relationship between Ms. Martin and her
8 supervisors and actually people she worked with got
9 even worse. It became very hostile. It was our
10 position that this resulted ultimately in her receiving
11 a termination letter in August of that year.
12 Currently, Ms. Martin is not working and she has not
13 worked, frankly, since her termination in August,
14 despite her best efforts.

15 The only type of employment that she has had
16 has been extremely part time, which has been to help
17 people prepare tax returns. So the salary that she
18 previously received has been completely lost. Her
19 salary was approximately -- within the region of
20 \$30,000 annually, and she has not received any salary
21 since then.

22 THE COURT: Can you at least put this in a
23 framework for me because I'm not following. Since you
24 began by saying that you won't be pursuing the claims
25 that she was mistreated by Ms. Peza, I'm not following

1 what the legal theory is.

2 MR. WOTORSON: What I meant to say was, the
3 theory before was that my client was mistreated by Ms.
4 Peza in retaliation for her having filed a previous
5 lawsuit. Now, there are several problems with that
6 claim. Not only would it have been somewhat stale
7 because the lawsuit was filed several years ago, but it
8 now turns out after we did discovery, that the lawsuit
9 did not name Ms. Peza, the lawsuit did not actually
10 claim some of the things that we have in our complaint.

11 So all that remains is that Ms. Peza was a
12 supervisor of the plaintiff. It's our position that
13 Ms. Peza did mistreat the plaintiff, but we're not
14 going to pursue a claim that Ms. Peza mistreated the
15 plaintiff because of her prior lawsuit at another job.
16 That is not going to be --

17 THE COURT: You actually -- at the
18 conference on June 14th of last year, you specifically
19 said that the retaliation claim was not intended to
20 refer to the EEO complaint against the prior employer.
21 So it wasn't my impression that that was your theory.

22 MR. WOTORSON: I don't understand, your
23 Honor.

24 THE COURT: I think I asked --

25 MR. WOTORSON: The lawsuit -- she filed a

1 lawsuit.

2 THE COURT: Against the prior employer.

3 MR. WOTORSON: Correct. She filed a
4 lawsuit.

5 THE COURT: Right. But when I asked whether
6 the retaliation was by the then current employer -- was
7 for the discrimination charges against the previous
8 employer, you said no.

9 MR. WOTORSON: No, and that is correct. We
10 were -- the prior lawsuit was against another employer.
11 It was our theory at the time that Ms. Peza had worked
12 for that previous employer.

13 THE COURT: I understand, because I have
14 read the defense lawyers' letters to Judge Garaufis and
15 I was a little surprised when they were assuming that
16 the retaliation intended to refer to the prior
17 employment situation. But in any event, you're not --
18 are you saying you're not pursuing the retaliation
19 claim that's alleged in the complaint?

20 MR. WOTORSON: Correct. I don't think -- I
21 don't think we have a basis, after discovery. It's
22 clear that Ms. Peza -- through the depositions, that
23 Ms. Peza was not named in a prior complaint. Frankly,
24 I think we have a serious staleness problem, so that is
25 not being pursued.

1 THE COURT: But you are saying that she was
2 mistreated by Ms. Peza?

3 MR. WOTORSON: Correct. And it's our
4 contention that Ms. Martin made timely complaints to
5 both her employer and her union about that
6 mistreatment, and that the union, in our estimation,
7 completely dropped the ball, ultimately resulting in
8 her having to treat with a mental healthcare
9 professional and her being terminated after we filed
10 the lawsuit.

11 THE COURT: But what was -- the allegation
12 was that Ms. Peza mistreated her on account of what?

13 MR. WOTORSON: On account of her prior
14 protected activity at the prior job that Ms. Peza was
15 also a supervisor of Ms. Martin. Now, we're -- we've
16 always in the position to sort of cut out that, and we
17 still have a freestanding harassment claim. Luckily,
18 in these type of --

19 THE COURT: Well, you don't have a
20 freestanding harassment claim against the hospital.

21 MR. WOTORSON: Your Honor, she -- Ms. Peza
22 was employed by the hospital.

23 THE COURT: Right.

24 MR. WOTORSON: And these type of hybrid
25 actions are one of the few times -- one of the few

1 areas where you can actually complain about what I will
2 call, you know, vanilla harassment, meaning there's no
3 discrimination claim or whatnot. And here, the theory
4 is, she complained both to her employer as well as her
5 union about it. And the nature of the harassment was
6 such that it violated the terms of her contract. She
7 also had an opportunity to --

8 THE COURT: What in particular in her
9 contract?

10 MR. WOTORSON: There are -- there is a union
11 agreement that says she can only be terminated for good
12 cause shown, one. And there is --

13 THE COURT: Well, now you're arguing
14 termination, which may or may not be in the case. So
15 let's talk about what's alleged in the complaint.

16 MR. WOTORSON: The complaint -- the union
17 contract has a detailed due process procedure for
18 things such as demotions --

19 THE COURT: Is there any claim she was
20 demoted?

21 MR. WOTORSON: There's not a claim that she
22 was demoted but there is a claim, though, that as I
23 said before, that she was forced to treat with a mental
24 healthcare professional as a condition of her
25 employment. And from our standpoint --

1 THE COURT: Is there something in the
2 collective bargaining agreement or any -- is it the
3 collective bargaining agreement that you say was
4 violated?

5 MR. WOTORSON: Yes, yes. And that part is a
6 diminution of status. It's not your traditional
7 demotion. But having to treat with a mental healthcare
8 professional as a condition of your employment is a
9 diminution of status. No one else has to do that, she
10 had to do that, and that impacted her ability to
11 function, which she'll explain to you as she speaks
12 with you privately. So that was our position as to how
13 the union contract certainly was violated. And then as
14 I said before, she was terminated without cause.

15 THE COURT: All right, let me hear from Mr.
16 Greenhaus first.

17 MR. GREENHAUS: Yes, your Honor.

18 I'm not sure that I'm any closer to
19 understanding exactly what plaintiff is alleging
20 against Lutheran now than I was before. We had this
21 discussion before Judge Garaufis. And as I understood
22 it, plaintiff's counsel was essentially withdrawing the
23 claims that were alleged in the complaint for
24 retaliation as against Lutheran and, instead, was
25 offering up a new theory, one that he had about a year

1 to seek to amend to this complaint, that she was
2 retaliated against by Lutheran terminating her
3 employment in response to her filing this complaint.

4 We have a challenge in drafting a summary
5 judgment motion here because we're not quite sure what
6 the claims are. And I think Judge Garaufis ordered, if
7 the case doesn't settle, plaintiff's counsel will file
8 a letter clarifying his claims. But the way I'm
9 understanding this is, that's the only claim against
10 Lutheran right now. This mistreatment claim against
11 Ms. Peza only relates in so far as the union failed to
12 respond to it.

13 So with respect to the termination claim,
14 the hospital doesn't really see a path to success for
15 the plaintiff here. Number one, plaintiff has to move
16 to amend the complaint, basically. He's had a year to
17 do that, hasn't done it. I don't know whether we would
18 stipulate to that or not. But assuming we didn't, the
19 Court frankly might not grant that motion at this
20 point, in which case, having withdrawn the claims
21 against Lutheran, he might have a claim under Section
22 296 but he would have to go refile that in state court,
23 where it would probably sit for a number of years.

24 Even if the Court was inclined to amend the
25 complaint, I don't know that the Court would allow the

1 amendment as to the union, because the claim against
2 the union for the termination is time barred. The
3 termination occurred in August. Section 301 has a six-
4 month statute. So I don't know that the Court is
5 allowing that amendment as to the union.

6 And in that case, there's no federal
7 jurisdiction as against Lutheran. The claim is only, I
8 think -- I know it's not under federal law. I think
9 it's state and city law. Judge Garaufis basically
10 said, if there's not federal jurisdiction, he's not
11 deciding this case. And then plaintiff is back in
12 state court against, refiling this, where it will sit.

13 If the Court does grant the amendment, then
14 you asked what Lutheran would prove at trial, and it's
15 pretty simple. Plaintiff was suspended in January for
16 insubordinate behavior. That resulted -- that was the
17 result of --

18 THE COURT: I'm sorry, remind me. Was that
19 2011?

20 MR. GREENHAUS: This is 2011, correct. She
21 then went out on leave.

22 THE COURT: Was that an incident involving
23 Ms. Peza?

24 MR. GREENHAUS: No, no. Ms. Peza, in fact,
25 to the extent it's relevant, had very little

1 interaction with the plaintiff. She was, I think, a
2 second level supervisor. Ultimately, she was the
3 director of nursing, I think.

4 MS. ALFREDO: Associate director.

5 MR. GREENHAUS: Associate director. So she
6 did have some charge of responsibility but she was not
7 the direct supervisor and did not directly discipline
8 plaintiff on any occasion. Occasionally, she signed a
9 discipline as a witness but she didn't administer the
10 discipline.

11 Plaintiff goes out on leave without
12 incident. She goes out, she comes back. And in
13 August, 2011 --

14 THE COURT: The suspension was for how long?

15 MR. GREENHAUS: It was for either two days
16 or four days.

17 THE COURT: So when you say she went out on
18 leave, you're talking about the suspension --

19 MR. GREENHAUS: No.

20 THE COURT: -- or beyond the suspension?

21 MR. GREENHAUS: Beyond the -- she comes back
22 and she's suffering from some sort of disability. She
23 takes -- she goes out on a leave without incident.
24 It's unrelated to the anger management. She goes out
25 on leave, she comes back. And then in August, 2011 --

1 she's a CNA, by the way. Lutheran Augustana is an
2 extended care facility. She is charged with bringing a
3 resident to the Lutheran clinic for a medical
4 appointment. I think it was an x-ray.

5 It was near the end of her shift. I think
6 her shift ended at 3:00. And at the end of her shift,
7 the medical procedure either wasn't completed or it was
8 completed but they still needed to finalize some
9 details. So rather than stay with the resident, as
10 she's required to do, she left the facility, came back
11 to Lutheran Augustana, said, my shift is over, you need
12 to send someone else over there.

13 She admitted at deposition she did this.
14 This is a clear breach of Lutheran Augustana's rules
15 when it comes to caring for residents. The resident I
16 don't think was -- I don't think the resident suffered
17 from dementia but had some sort of mental --

18 MS. ALFREDO: Changes in mental status.

19 MR. GREENHAUS: He wasn't sure where he was
20 all the time. I don't think it was clinically
21 dementia. But the rules of the facility clearly
22 require her to stay with that resident when you're off
23 premises.

24 Plaintiff testified that she told the
25 doctors and nurses at the clinic that she was leaving

1 but the doctors and nurses had other patients to tend
2 to and other jobs to do, and it's not their
3 responsibility to care for this resident.

4 Now, putting aside the various forms of
5 discipline that plaintiff received over the years,
6 putting aside the suspension that happened in January,
7 that in and of itself, leaving a resident over there,
8 is ground for termination.

9 THE COURT: So the resident was where?

10 MR. GREENHAUS: So Lutheran Augustana is,
11 like I said, an extended care facility. I believe that
12 it's across the street -- I'll let Ms. Alfredo --

13 MS. ALFREDO: Yes, your Honor. Lutheran
14 Augustana is a nursing home, essentially. Across the
15 street from Lutheran Augustana is Lutheran Medical
16 Center, which is a hospital. It also operates clinics.
17 And within the four walls of the hospital is something
18 called a specialty clinic, where patients, including
19 residents of Augustana, on referral from Augustana,
20 come to get medical care. So that's where Ms. Martin
21 was chaperoning this resident.

22 MR. GREENHAUS: So she came back to Lutheran
23 Augustana -- she admits this -- and --

24 THE COURT: She left the resident
25 unattended?

1 MR. GREENHAUS: Correct, yes, in -- yes,
2 came back and then left for the day. When this all
3 came to her supervisor's attention, there was an
4 investigation done. And after investigating it,
5 Lutheran terminated her employment. There's no
6 evidence in the record that the termination was for any
7 reason other than a legitimate business reason, the
8 failure to properly care for the resident.

9 So number one, we think this case is one
10 that, even if -- even if it includes a termination,
11 it's going to be disposed of on summary judgment based
12 on the facts, the undisputed facts in the record. I
13 don't know that there's a disputed fact here. And if
14 not, certainly at trial, all the witnesses will testify
15 to that.

16 By the way, if I may, because it's
17 important. Plaintiff's counsel said that plaintiff
18 hasn't worked since she was fired. At her deposition,
19 she testified that she was taking tax preparation
20 courses with, I think, Jackson Hewitt, and that she is
21 not looking for a job.

22 THE COURT: Why don't you address the mental
23 health counseling issue, since that was focused on by
24 Mr. Wotorson.

25 MR. GREENHAUS: As I understand that, that's

1 really more of a claim against the union. I think that
2 -- defendant Lutheran did require plaintiff to undergo
3 anger management counseling. She agreed to do it.
4 It's not the first time it's happened at Lutheran. I
5 don't want to say it's routine but certainly it is --
6 it is the way Lutheran does business with employees who
7 have these issues. They don't fire those employees,
8 they try to resolve the issue.

9 THE COURT: I'm sorry, it was anger
10 management?

11 MR. GREENHAUS: I believe it was anger -- I
12 believe it was anger management, yes.

13 MR. WOTORSON: Member assistance program.
14 That's the official name. Member assistance program.
15 At her deposition --

16 THE COURT: All right.

17 MR. WOTORSON: Sorry.

18 THE COURT: I'll give you an opportunity to
19 respond after I hear from Mr. Dorn.

20 MR. DORN: Your Honor, the claim in the
21 complaint basically alleges that the union breached its
22 duty of fair representation and that Lutheran violated
23 the contract, which I assume was the collective
24 bargaining agreement. That's a hybrid, Section 301 DFR
25 complaint, under which the plaintiff has to prove both

1 that the union violated its duty of fair representation
2 and that the employer violated the collective
3 bargaining agreement. I don't believe plaintiff can
4 prove either.

5 There is a six-month statute of limitations
6 for those kind of cases, and the only -- the sole
7 allegation in the complaint that is within the six-
8 month statute relates to that suspension, which
9 occurred in January of 2011. At that time, the union
10 did file a grievance. There was a grievance meeting,
11 at which Ms. Martin attended.

12 The union believes that it had convinced
13 management to reduce the penalty from four days to two
14 days. And it is true that management wanted Ms. Martin
15 to attend what the union calls a behavior modification
16 session. That was because Ms. Martin had claimed that
17 a number of supervisors had been following her around
18 and harassing her, and that a number of employees had
19 also been harassing her. When the union organizer
20 asked Ms. Martin for the names of those employees so
21 that the union could convene a meeting to discuss the
22 situation, Ms. Martin refused to give the organizer the
23 names.

24 In any event, it is not true that this was a
25 unique situation involving a behavior modification.

1 There were at least three other employees at Lutheran
2 who had been made to attend such a program and there
3 are hundreds if not thousands over the years that have
4 been attending those programs throughout the union.

5 The union then asked Ms. Martin to let the
6 union know whether she was willing to attend that
7 program or whether she was not. Ms. Martin never got
8 back to the union. It appeared, after a while, that
9 Ms. Martin did attend at least one session, and she
10 went back to work. The union never, never heard from
11 Ms. Martin again.

12 When the union learned that Ms. Martin had
13 been terminated in August, which was after the
14 complaint had been filed in March of that year, the
15 union sent Ms. Martin notification, asking her whether
16 she wanted the union to proceed to arbitration. Ms.
17 Martin never got back to the union.

18 In any event, the union would certainly be
19 opposed to an amendment of the complaint against it
20 because, as I've indicated, the statute of limitations
21 for a duty of fair representation issue is six months
22 and this is a completely separate matter that cannot
23 relate back to the filing of the original complaint.
24 Therefore, as far as the union is concerned, there is
25 no basis for the complaint against the union.

1 MR. WOTORSON: I'm sorry --

2 THE COURT: All right.

3 MR. WOTORSON: Let me go backwards. As an
4 initial matter, Mr. Dorn may be correct. We may be
5 time barred with respect to the union, and because it
6 is true that there is a six-month statute of
7 limitations. I'm unsure at this point whether or not
8 relation doctrine that would apply.

9 However, your Honor, what you just heard
10 essentially was -- and I thank you, Mr. Dorn, for
11 laying it out a little differently from your colleague,
12 but he just told you that there were a series of
13 complaints that Ms. Martin had made about her
14 supervisors harassing her and following her.

15 We took the deposition of a human resources
16 person who is employed by the hospital, Ms. Widdige
17 (ph). Ms. Widdige concedes and said the following in
18 her deposition: She agreed that the hospital did
19 demand as a condition of her continued employment that
20 plaintiff participate in the member assistance program.
21 She said that the member assistance program is a mental
22 health program.

23 THE COURT: I don't think that's disputed.

24 MR. WOTORSON: I'd like to go a little
25 further here. She further says that -- she testified

1 that she wanted her to speak with a mental healthcare
2 professional rather than her being fired, and this came
3 up because she had made these complaints. According to
4 Widdige, she recommended that plaintiff treat with a
5 mental healthcare professional because she was angry
6 and distrustful. She also said that -- and she said
7 she wanted to document plaintiff's mental health
8 issues. This is from the human resources person.

9 She goes on to say that she really thought
10 plaintiff had treat with a mental healthcare
11 professional because plaintiff complained to her and
12 told her "several anecdotes demonstrating the
13 plaintiff's mental instability." This is what happened
14 and you've not gotten the full story from the
15 defendants here. This is Ms. Widdige's words, that it
16 was demonstrating mental instability.

17 Widdige herself said -- she said she found
18 no basis for -- apparently, there are some employees
19 who apparently said or suggested that the plaintiff was
20 mentally unstable. Ms. Widdige said she herself saw no
21 evidence of the plaintiff being mental unstable.

22 The bottom line, your Honor, is it's our
23 theory that rather than the union do its job, the union
24 was part and parcel of allowing her to treat with a
25 mental healthcare professional, a psychiatrist, because

1 she was allegedly mentally unstable. And this only
2 came up because she complained about her supervisors.
3 That's the case. We may not have the type of
4 termination damages as against the union but if we get
5 to trial, that's going to be our position with respect
6 to the union.

7 THE COURT: Well, you say she complained
8 about her supervisors. You haven't responded to Mr.
9 Dorn's assertion that when she complained to the union
10 and the union said, who are these people that are
11 harassing you, she declined to give any names.

12 MR. WOTORSON: Your Honor, I have not
13 responded to that because, frankly -- your Honor thinks
14 that's important and maybe it is. I didn't think that
15 was important enough to say, you treat with a mental
16 healthcare professional. If the plaintiff said, I'm
17 not trusting you right now, I'd like some assurances
18 because I don't want to be subjected to retaliation, I
19 don't think that's a sufficient basis for someone to
20 treat with a mental healthcare professional.

21 THE COURT: Well, now you're -- now you're
22 putting words in your client's mouth. Is that what she
23 testified to in deposition?

24 MR. WOTORSON: She didn't testify to that
25 but I will say, your Honor, that I have a good faith

1 basis for saying what I just said. I'm pretty sure she
2 did not testify to that. But the larger point I'm
3 trying to make, your Honor, is I don't think -- if we
4 got past a motion for summary judgment, if we got to a
5 trial on this issue, I don't think the determining
6 factor would be whether or not the plaintiff failed to
7 give the names.

8 What's clear here and what both of these
9 attorneys have said is that this issue of her being
10 mental unstable and having to treat with a mental
11 healthcare professional arose out of her complaining
12 about being followed by supervisors and being harassed
13 by supervisors. Ms. Widdige herself specifically said
14 my client made certain anecdotes that led her to
15 believe that she was mentally unstable.

16 THE COURT: I thought -- I thought you said
17 that Ms. Widdige said she didn't -- she herself didn't
18 see any mental instability. I'm a little confused now.

19 MR. WOTORSON: Apparently, some employees
20 complained as well about her being mentally unstable,
21 and she, in her deposition -- whether it's
22 contradictory, this is her deposition. In her
23 deposition, she says there were several anecdotes --
24 I'm sorry, there were several employees who gave
25 several anecdotes demonstrating plaintiff's mental

1 instability. That's what she said.

2 And then she said she herself didn't see any
3 basis for the employees' conclusions but she still
4 demanded -- this is critical -- she still demanded that
5 as a condition of my client's employment, she treat
6 with a mental healthcare professional. You know,
7 that's where the case may center around. Again, we
8 think that we'll have a live retaliation termination
9 claim as to the employer.

10 Finally, Mr. Dorn also says that --

11 THE COURT: What about the incident that,
12 according to Mr. Greenhaus, was the reason for her
13 termination? Does she dispute that account of what
14 happened?

15 MR. WOTORSON: She does dispute the account
16 and --

17 THE COURT: What happened?

18 MR. WOTORSON: Contrary to -- I will let Ms.
19 Martin speak with you about that. Contrary to --

20 THE COURT: I'd like -- I'd like it
21 addressed in the context of this -- you know, this
22 group setting.

23 MR. WOTORSON: Your Honor, I'm prepared to
24 divulge only the following, except to say that she did
25 say that she did leave but she also testified at length

1 about informing other people who were responsible and
2 not just -- not just doctors. I'm not so sure that it
3 would be sufficient to simply say that you informed the
4 doctors and the doctors are too busy. There are other
5 -- that's what I thought. There are other employees
6 who she informed as well, so it wasn't quite the
7 concession that the defendants had made out but there
8 was some --

9 THE COURT: So she left the resident at the
10 hospital, unchaperoned --

11 MR. WOTORSON: No. Her --

12 THE COURT: -- and returned to --

13 MR. WOTORSON: Her position is she left the
14 resident supervised, not unchaperoned, as defendants --

15 THE COURT: Supervised by whom?

16 MR. WOTORSON: That's what she testified to.

17 THE COURT: Supervised by whom?

18 MR. WOTORSON: She testified that she spoke
19 with several doctors.

20 THE COURT: At the hospital?

21 MR. WOTORSON: And another -- and another
22 CNA. Right. And I believe she -- and at least one
23 other CNA who was responsible.

24 THE COURT: Where was -- where were these
25 other people?

1 MR. WOTORSON: The CNA was right there.

2 THE COURT: With another resident?

3 MR. WOTORSON: Yes. It was right in the
4 same area -- in the same -- where the resident was, in
5 the same area where the resident was.

6 THE COURT: But that other CNA was with
7 another resident.

8 MR. WOTORSON: No, your Honor. This
9 particular resident was not in the general population.
10 This particular resident was already segregated and
11 this CNA was -- I mean, this is all the same
12 department, but this particular resident was not in the
13 general population.

14 The CNA was -- I'm trying to think of a word
15 but was close enough to have purview over this person,
16 meaning she specifically spoke with the other CNA and
17 she also informed the doctors.

18 THE COURT: Where was that CNA at the time?

19 MR. WOTORSON: She just says -- yeah, your
20 Honor, she testified to at the deposition that there
21 was -- and she described the area. There was a small
22 area where the scanning was. It wasn't as if she
23 didn't --

24 THE COURT: This was in the hospital?

25 MR. WOTORSON: In the hospital.

1 THE COURT: But why was the other CNA in the
2 hospital, because that's not -- that's not where
3 they're employment is generally located.

4 MR. WOTORSON: The bottom line, your Honor,
5 is there is a disputed issue of fact here. She agrees,
6 though, that she did leave. Her position is that she
7 informed responsible people who were aware, at least
8 one CNA and there was also a nurse involved and I
9 believe at least one doctor. That's what she testified
10 to, so that's it. I mean, the defendants' version is
11 somewhat different from ours, and that will go to
12 whether or not there was a proper termination.

13 I also think it's still a disputed issue of
14 fact because there arises whether or not there's a
15 mixed motive, whether or not she really was, you know,
16 terminated for this or whether she was also terminated
17 in part because she had a pending lawsuit. I don't
18 think that's something that's easily disposed of on a
19 summary judgment motion, especially given the fact that
20 we're talking about a comparatively short temporal
21 proximity, March/August.

22 But importantly, I wouldn't even argue the
23 traditional temporal proximity argument because the
24 lawsuit was still pending. So every day, the time
25 frame between the protected activity and the

1 termination is extended because the lawsuit was
2 pending.

3 THE COURT: All right. Anything further?

4 MR. GREENHAUS: The issues that Mr. Wotorson
5 discussed regarding what Ms. Widdige testified to --
6 plaintiff testified that she never complained to Ms.
7 Widdige about anything related to racial or sexual or
8 harassment related to a previous lawsuit. Ms. Widdige
9 never testified that plaintiff came to her with racial
10 or sexual or any other sort of harassment.

11 THE COURT: I don't think she's saying
12 otherwise now.

13 MR. GREENHAUS: Okay.

14 THE COURT: Nor is Mr. Wotorson.

15 MR. GREENHAUS: Secondly, all those issues -
16 - those conversations with Ms. Widdige occurred prior
17 to the termination of employment, which again, it
18 appears that now this case is only about, as to
19 Lutheran, the termination of employment.

20 MR. WOTORSON: No, your Honor, and I mean no
21 disrespect. I respect counsel a lot and he knows, and
22 I've told him as much, but I do think now there is an
23 intentional effort to obfuscate the Court. We just
24 heard from both counsel -- this was not something I
25 brought up first. They said that after she complained

1 -- it was in the context of her complaining that the
2 issue of her treating with a mental healthcare
3 professional arose.

4 THE COURT: Why does the violation that you
5 are alleging -- I understand she wasn't -- I won't even
6 say I understand she wasn't happy because the
7 allegation is that she agreed to it, but you're now
8 saying that that was improper and that she was singled
9 out, I don't know for what reason, since you're not
10 alleging discrimination.

11 MR. WOTORSON: Your Honor --

12 THE COURT: And I've heard that others were
13 also required to undergo mental health counseling. So
14 tell me what is the wrong committed by the -- by
15 Lutheran with respect to -- what violation occurred,
16 whether your client thinks --

17 MR. WOTORSON: Sending her -- sending her to
18 treatment requiring --

19 THE COURT: What's the violation?

20 MR. WOTORSON: -- requiring that she treat
21 with a mental healthcare professional as a condition of
22 her employment.

23 THE COURT: What provision of the collective
24 bargaining agreement was violated?

25 MR. WOTORSON: That was a diminution of

1 status, which is akin to a demotion. She was
2 specifically told and Widdige testified that had she
3 not treated with a mental healthcare professional, she
4 would have been fired. Again, this is critical --

5 THE COURT: Was she told that at the time?

6 MR. WOTORSON: Counsel said yes, but
7 importantly, Ms. Widdige testified about it at
8 deposition, that she was -- that she said that she said
9 that. And I forget the date --

10 THE COURT: But what's -- I understand -- I
11 will concede for purposes of our discussion today --
12 I'm not making a legal determination, but let's assume
13 that it is an adverse employment action, so that we
14 won't get -- but the question is, what makes it a
15 wrongful adverse employment action. That's my
16 question.

17 MR. WOTORSON: Sure, I gotcha. It is only
18 wrongful in the context of the collective bargaining
19 agreement because --

20 THE COURT: What -- and that's what I'm
21 trying to focus on. What is the violation of the
22 collective bargaining agreement that you're alleging.

23 MR. WOTORSON: And I said, there is a whole
24 due process requirement that has to be -- in other
25 words, if --

1 THE COURT: And how was the -- how was -- so
2 you're saying it's a procedural violation.

3 MR. WOTORSON: Correct, which was --

4 THE COURT: What is the procedural
5 violation?

6 MR. WOTORSON: There was no notice or
7 opportunity to be heard with respect to her having to
8 treat with a mental healthcare professional . She was
9 simply told you either treat with the psychologist or
10 you're fired. That's what happened, and I don't think
11 defendants are going to dispute that.

12 I just want to add, because I don't think
13 this is an issue but I just want to make sure we're all
14 on the same page. I agree, had she specifically been
15 complaining about discrimination and she was sent to a
16 mental healthcare professional specifically because of
17 discrimination, we would have another cause of action.
18 I don't think that's what we have here.

19 We have here merely that she did complain
20 about being harassed. She thought it was because of
21 her prior lawsuit. The evidence doesn't really
22 establish that that's what was going on. But
23 importantly, when she did complain, her complaints
24 essentially were met with, you're crazy, you go to a
25 mental healthcare professional as a condition of your

1 continued employment.

2 Defendants started off by saying it was
3 merely anger management. That's not what it was. Even
4 Ms. Widdige didn't say it was simply anger management.

5 And --

6 THE COURT: Well, you seem to be
7 distinguishing between anger management and
8 psychological counseling.

9 MR. WOTORSON: I am, I am.

10 THE COURT: Well, don't.

11 MR. WOTORSON: I understand --

12 THE COURT: So when I say anger management,
13 it doesn't mean that's to the exclusion of
14 psychological counseling. Hopefully, the person who is
15 the treater for anger management is someone with
16 psychological expertise.

17 MR. WOTORSON: Your Honor, I completely
18 understand where you're coming from, but it's important
19 that I say this because -- from a settlement
20 perspective. Again, if we happen to get past a motion
21 for summary judgment, it's my position, and I know that
22 your Honor was a trial attorney as well, but it's my
23 position that -- I don't think a jury would simply
24 assume that anger management and treating with a mental
25 healthcare professional are one and the same.

1 I think jurors will recognize the
2 distinction, especially in the context of Ms. Widdige
3 saying there were other employees who gave anecdotes of
4 her being mentally unstable. She didn't see any
5 evidence of the mental instability. Those are the
6 words she was using herself, but she was sent to go
7 through with the mental healthcare professional.

8 She also explained what the membership
9 assistance program was. She herself said it wasn't
10 just anger management. It was a medical healthcare
11 program, essentially for people who are having mental
12 problems. You could say, well, anger is a mental
13 problem. I think a jury drawn from Kings County and
14 Nassau, Suffolk, wherever they come from in Eastern
15 District, I think they're going to be a little bit more
16 -- are going to see a little bit more into that. I
17 don't think they're going to see the two as the same.

18 THE COURT: Who do you think they're going
19 to see as being the treator for anger management?

20 MR. WOTORSON: Judge, I think it's
21 irrelevant. I think the word anger management vastly
22 downplays -- vastly downplays the fact that she was --
23 she was viewed as being a crazy person. And because
24 she was viewed as being a crazy person, she was asked
25 to treat with a mental healthcare professional as a

1 condition of her employment.

2 I mean, the phrase anger -- if I were to say
3 it, I would say it was just anger management. I think
4 anger management is different from saying -- treating
5 with a mental healthcare professional because we
6 thought she was crazy. Anger management is you can't
7 control your anger sometimes, you know. You might yell
8 at patients, you might -- I don't know, you might --

9 THE COURT: Nobody said she was crazy.

10 People can have mental issues without being insane.

11 MR. WOTORSON: It's a semantic argument but
12 it's important that I try to convince you. I think the
13 phrase mental instability is perilously close to crazy,
14 versus -- you don't describe someone who has an anger
15 management issue as being mentally unstable, do you?
16 You don't.

17 THE COURT: Unless you're thinking of
18 Charlie Sheen.

19 MR. WOTORSON: I think it important that you
20 at least get the point I'm trying to make, so that's
21 where we are.

22 THE COURT: I'm getting the point you're
23 trying to make. I don't agree with you.

24 MR. WOTORSON: I understand, Judge.

25 THE COURT: All right, anything else?

1 Otherwise, I'll just meet with each group of parties
2 separately.

3 All right, so the one thing I haven't asked,
4 and I just want a yes or no: Have there been any
5 settlement discussions?

6 MR. WOTORSON: Very, very, very basic. I
7 don't think --

8 THE COURT: I mean, I would like to know
9 what those are but we have two individuals in the back
10 of the courtroom and I don't know who they are and what
11 their connection with this -- excuse me?

12 UNIDENTIFIED SPEAKER: (Ui).

13 MR. GREENHAUS: Related to plaintiff.

14 THE COURT: To Ms. Martin?

15 UNIDENTIFIED SPEAKER: Yes.

16 THE COURT: All right. So I assume there's
17 no objection if they're here, if we go off the record
18 and we talk about the settlement discussions, or would
19 we prefer to do that privately?

20 MR. GREENHAUS: No objection.

21 MR. DORN: Your Honor, I have no objection.
22 I don't believe there were any really serious
23 settlement discussions.

24 MR. WOTORSON: I agree.

25 THE COURT: Well, was there a demand? And

1 if so, I'd like to go off the record to hear it, rather
2 than putting it on the record.

3 MR. WOTORSON: I don't remember what the
4 demand -- but I do remember, I had -- even though they
5 were light, I had some -- I thought some fruitful
6 discussions with Mr. Dorn very early on in the
7 litigation, and there might have been a number
8 exchanged. I don't remember.

9 THE COURT: Why don't we go off the record.

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



ELIZABETH BARRON

August 10, 2012